

- A Interstate M & E Sdn Bhd & Ors v
Fore-Sight Trading Sdn Bhd & Ors**
- B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6-22-814 OF 2005
ABDUL MALIK ISHAK J
17 JULY 2007**
- C** *Civil Procedure — Injunction — Interlocutory injunction — Interlocutory injunction to stop from obstructing or interfering with land and factories therein — Whether there were serious questions to be tried — Whether the balance of convenience lay in favour of plaintiffs*
- D** *Civil Procedure — Injunction — Principles to be applied in granting injunction — Whether there were serious questions to be tried — Whether the balance of convenience lay in favour of plaintiffs — Whether the fact the defendant voluntarily undertaken to carry out the obligations now sought to be enforced would be a relevant factor*
- E** The plaintiffs' filed an application for an interim interlocutory injunction against the defendants seeking inter alia to restrain the defendants from obstructing and/or interfering in any manner whatsoever with the plaintiffs' peaceful and quiet enjoyment, and/or from taking possession, entering into, occupying, interfering with
- F** or remaining on the whole or any part, of the lands in question and the factories situated thereon together with all the fixtures, fittings, machinery and/or equipment whether movable or immovable located therein and to restrain the defendants from transferring, assigning, charging and/or dealing with in any manner whatsoever the lands in question and the factories situated thereon together with all the fixtures, fittings, machinery and/or equipment whether movable or immovable located
- G** therein. The first defendant filed an application for a mandatory injunction against the plaintiffs. The terms of the mandatory injunction sought by the first defendant are in effect the exact opposite of the orders sought by the plaintiffs, ie, to deliver up the 39 machinery and equipment listed in annexure 'A' to the first defendant, failing which, the plaintiffs, whether by themselves, servants or agents or any of them or
- H** otherwise, be restrained from preventing, obstructing or interfering in any way the first defendant removing and taking possession, custody and control of the 39 machinery and equipment; and to deliver up the other machinery and equipment listed in annexure 'B'. The plaintiffs' cause of action is for breach of contract on the part of the defendants based on the conduct of the defendants which amounts to a breach of or a repudiation of two sale and purchase agreements both dated 27 August
- I** 2004 ('SPAs') entered into between the first defendant and the third plaintiff. The SPAs are for the purchase by the third plaintiff from the first defendant the lands in question, the factory situated on the lands and machinery and equipment located on the lands. Based on the defendants' various representations and the delay in the completion of the SPAs, the defendants allowed the plaintiffs to take possession of

the lands, the factory and the machinery and equipment as well as other associated accessories and to utilise the same for the plaintiffs' business. After the plaintiffs had taken possession of the lands, the factory and the machinery and equipment, the defendants caused notices to be issued to their customers that with effect from 17 January 2005 all future correspondences and new orders are to be sent to the second plaintiff. The defendants evinced an intention to breach the SPAs and/or not to proceed with the SPAs by causing the issuance of three letters dated 24 June 2005 and 29 June 2005 through their solicitors Messrs Lee Hishammuddin Allen Gledhill. By those three letters, the defendants purported to (i) terminate the plaintiffs' right to use the machinery and equipment; (ii) terminate the plaintiffs' right to occupy the lands; (iii) demand that the plaintiffs ceased using the said machinery and equipment and to deliver possession of the same to the defendants; and (iv) demand that the plaintiffs deliver vacant possession of the lands. The main relief sought by the plaintiffs in the writ is for an order of specific performance of the SPAs

Held, allowing the plaintiffs' application and dismissing the first defendant's application:

- (1) It is trite law that the remedy of specific performance is an equitable remedy and the court will grant it to the plaintiff if it is just to do so. As of right, a plaintiff is not entitled to specific performance. The court will only grant specific performance instead of damages when it can by that means do more perfect and complete justice. Of course, the discretion to grant specific performance cannot be exercised capriciously. It must be exercised in accordance with the established principles (see para 13).
- (2) An equitable estoppel may go very far as to give rise to the acquisition of a new interest in property. In a situation of say, an owner of the land stands idly by particularly when another person incurs expenditure or detriment and the owner knows that, other person believes that he is, or will be, entitled to an interest in that land, a court with equitable jurisdiction will be so bold as to require the owner to give effect to that belief by not asserting inconsistent rights or even by transferring the legal title (see para 20(h)).
- (3) In the case of an injunction to enforce a contractual right, two special circumstances must be mentioned. Firstly, when questions of hardships are being considered between the parties, the fact that the defendant has voluntarily undertaken to carry out the obligations now sought to be enforced would be a relevant factor. Secondly, a question must also be posed and that would be whether the contract is the type that could be enforced by way of a specific performance. So, in all cases, where an injunction is sought in order to enforce a contractual right it is significant to enquire whether the plaintiff is entitled to obtain an order for specific performance. Orders for the specific performance of contractual rights are certainly different from orders requiring the defendant to abstain from performing certain acts (see para 23).
- (4) The defendants have raised many issues which need to be determined by this court. All these varied issues cannot be dealt with summarily. Indeed, particularly when there is a 'contest of affidavits' it becomes necessary

- A for this court to decline making any pronouncement as to which is the version of the disputed facts which is more believable (see para 31).
- (5) If the defendants are not restrained from entering the lands and the factory and from removing the machinery and equipment, the plaintiffs will suffer irreparable damage that cannot be adequately compensated by damages.
- B On the contrary, any damage to the defendants will be minimal when compared to the damage suffered by the plaintiffs and whatever damages sustained by the defendants, the plaintiffs are able to compensate. To date, there is no credible evidence before this court to demonstrate that the defendants have suffered any damages or detriment whatsoever. The balance of convenience certainly lies in favour of granting an interim injunction in the
- C plaintiffs' favour as prayed for in encl 4 (see para 33).
- (6) The defendants have alleged that the plaintiffs have initiated this action and in particular sought an interim injunction against the defendants in bad faith. This court cannot on affidavit evidence alone draw such an inference as to the
- D bona fides or mala fides of the parties to this action. As the burden of proof of mala fides in this case lies on the defendants, the latter should take the ordinary and obvious course of requiring the deponent of the plaintiffs' affidavits and/or the plaintiffs themselves to submit on the issue of mala fides during cross-examination of the trial of this case. In the meantime, the status quo of the parties should be preserved by granting the interlocutory injunction as
- E sought for by the plaintiffs (see para 36).
- (7) The orders sought by the first defendant amount to depriving the plaintiffs the use of all the machineries and equipment on the lands. This would cause the
- F plaintiffs' business to come to an abrupt halt and would severely jeopardise the plaintiffs' possession. It must be recalled that it was the defendants who gave the plaintiffs possession of all the machineries and equipment so that the plaintiffs would be able to carry out their business there (see para 42).

[Bahasa Malaysia summary]

- G Plaintiff telah memfailkan permohonan untuk satu injunksi interlokatori interim terhadap defendan-defendan memohon antara lain untuk menahan
- H defendan-defendan daripada menghalang dan/atau campur tangan dalam apa jua cara atas keamanan dan menikmati keadaan tidak bising plaintiff-plaintif, dan/atau mengambil milikan, memasuki, menghuni, campur tangan atau tinggal atas keseluruhan atau sebahagian tanah yang dipersoalkan dan kilang-kilang di atasnya
- I bersama-sama dengan Lekapan-lekapan, kelengkapan, jentera dan/atau peralatan sama ada boleh alih atau tak alih terletak di dalamnya dan untuk menghalang defendan-defendan daripada memindahkan, menyerahkan hak dan/atau berurusan dengan secara apa jua cara tanah yang dipersoalkan dan kilang-kilang yang terletak di atasnya bersama-sama dengan lekapan-lekapan, kelengkapan, jentera dan/atau kelengkapan sama ada boleh alih atau tak alih yang terdapat di dalamnya. Defendan pertama memfailkan satu permohonan untuk injunksi mandatori terhadap plaintiff-plaintif. Terma-terma injunksi mandatori yang dipohon oleh defendan pertama adalah sebenarnya berlawanan dengan perintah yang dipohon oleh plaintiff-plaintif, iaitu untuk menghantar 39 jentera dan kelengkapan yang

disenaraikan di dalam lampiran 'A' kepada defendan pertama, jika gagal, plaintif-plaintif, sama ada oleh mereka, pengkhidmat atau agen atau mana-mana daripada mereka atau sebaliknya di tahan daripada menghalang, mencegah, menghalang atau masuk campur dalam apa cara defendan pertama memindahkan dan mengambil milikan, jagaan dan kawalan 39 jentera dan kelengkapan; dan untuk menghantar jentera lain dan kelengkapan yang disenaraikan di dalam lampiran 'B'. Kausa tindakan plaintif adalah pelanggaran kontrak di bahagian defendan berdasarkan tindakan defendan-defendan yang menyebabkan kepada kemungkiran atau penolakan dua perjanjian jual beli yang kedua-duanya bertarikh 27 Ogos 2004 ('perjanjian') yang dimasuki antara defendan pertama dan plaintif ketiga. Perjanjian adalah untuk plaintif ketiga membeli daripada defendan pertama tanah yang dipersoalkan, kilang yang terletak di atas tanah dan jentera dan kelengkapan yang terletak di atas tanah. Berdasarkan kepada pelbagai representasi defendan-defendan dan kelewatan dalam menyiapkan perjanjian, Defendan telah membenarkan plaintif-plaintif untuk mengambil milikan tanah, kilang dan jentera serta kelengkapan begitu guja kelengkapan yang lain dan untuk menggunakannya bagi perniagaan plaintif-plaintif. Selepas plaintif mengambil milikan tanah, kilang, jentera dan kelengkapan, defendan-defendan telah menyebabkan notis yang dikeluarkan kepada pelanggan-pelanggan mereka bahawa berkuatkuasa daripada 17 Januari 2005 kesemua surat menyurat akan datang dan pesanan baru dihantar kepada plaintif kedua. Defendan memperlihatkan niat untuk memungkiri perjanjian dan/atau tidak meneruskan dengan perjanjian dengan menyebabkan pengeluaran tiga surat yang bertarikh 26 Jun 2005 dan 29 Jun 2005 melalui penguamcara mereka Tetuan Lee Hishammuddin Allen Gledhill. Melalui ketiga-tiga surat tersebut, defendan-defendan bertujuan untuk (i) menamatkan hak plaintif-plaintif untuk menggunakan jentera dan kelengkapan; (ii) menamatkan hak plaintif-plaintif untuk menduduki tanah; (iii) menuntut bahawa plaintif berhenti daripada menggunakan jentera dan kelengkapan serta menyerahkan milikan kepada defendan; dan (iv) menuntut kepada plaintif menyerahkan milikan kosong tanah tersebut. Relif utama yang diminta oleh plaintif di dalam writ adalah untuk perintah perlaksanaan spesifik perjanjian.

Diputuskan, membenarkan permohonan plaintif dan menolak permohonan defendan pertama:

- (1) Adalah undang-undang yang mantap bahawa remedi perlaksanaan spesifik adalah remedi yang adil dan mahkamah akan membenarkannya kepada plaintif jika ianya adil melakukannya. Sebagaimana hak, plaintif adalah tidak berhak ke atas perlaksanaan spesifik. Mahkamah hanya akan membenarkan perlaksanaan spesifik sebagai ganti gantirugi apabila ianya boleh melalui cara tersebut melakukan keadilan yang sempurna dan lengkap. Sudah tentu, budi bicara untuk membenarkan perlaksanaan spesifik tidak boleh dilakukan secara tidak menentu. Ianya mestilah dilakukan sejajar dengan prinsip yang telah mantap (lihat perenggan 13).
- (2) Estoppel yang adil mungkin pergi jauh bagi memberikan peningkatan kepada pemerolehan kepentingan baru dalam harta tanah. Dalam satu situasi dikatakan, pemilik tanah berdiri sahaja terutama apabila orang lain menanggung perbelanjaan atau menjejaskan dan pemilik mengetahui bahawa

- A** orang lain percaya bahawa beliau adalah atau akan berhak kepada kepentingan dalam tanah tersebut, mahkamah dengan bidang kuasa ekuiti akan menjadi berani untuk meminta pemilik untuk memberikan kesan kepada kepercayaan tersebut dengan tidak menyatakan hak yang tidak konsisten atau walau dengan memindahkan milikan perundangan (lihat perenggan 20(h)).
- B** (3) Dalam kes injunksi bagi menguatkuasakan hak kontraktual, dua keadaan istimewa mesti dinyatakan. Pertama, apabila soalan kepayahan dipertimbangkan di antara pihak-pihak, fakta bahawa defendan dengan relanya bersetuju melakukan tanggungjawab sekarang meminta untuk menguatkuasakan adalah faktor yang relevan. Kedua, satu soalan perlu
- C** diajukan dan ianya sama ada perjanjian adalah jenis yang boleh dikuatkuasakan melalui pelaksanaan spesifik. Oleh itu dalam kesemua kes di mana injunksi dipohon bagi menguatkuasakan hak kontraktual adalah penting untuk bertanya sama ada plaintif berhak untuk mendapatkan perintah bagi pelaksanaan spesifik. Perintah untuk pelaksanaan spesifik bagi hak kontraktual adalah pastinya berbeza daripada perintah yang meminta defendan
- D** untuk menahan diri daripada melakukan tindakan tertentu (lihat perenggan 23).
- (4) Defendan-defendan telah membangkitkan banyak isu yang perlu di pertimbangkan oleh mahkamah ini. Kesemua isu-isu yang berbeza tidak boleh diuruskan dengan ringkas. Tentu saja, terutamanya apabila terdapatnya
- E** 'afidavit yang dipertikaikan' ianya menjadi penting untuk mahkamah ini untuk menolak membuat apa-apa pengumuman berkenaan dengan versi dipertikaikan yang mana satu lebih dipercayai (lihat perenggan 31).
- (5) Jika defendan tidak ditahan daripada memasuki tanah dan kilang serta daripada memindahkan jentera dan kelengkapan, plaintif akan menanggung kerugian yang tidak boleh ditebus yang mana tidak cukup untuk dipampaskan dengan gantirugi. Sebaliknya, mana-mana kerugian kepada defendan adalah sedikit apabila dibandingkan dengan kerugian yang ditanggung oleh plaintif dan apa jua kerugian yang dialami oleh defendan plaintif adalah mampu untuk memberi pampasan. Sehingga sekarang, tidak terdapatnya keterangan yang
- F** boleh dipercayai di hadapan mahkamah ini untuk menunjukkan bahawa defendan telah menanggung apa-apa kerugian atau yang menjejaskan.
- G** Imbangan kemudahan tentunya ke atas membenarkan injunksi interim bagi pihak plaintif seperti mana yang dipohon dalam lampiran 4 (lihat perenggan 33).
- H** (6) Defendan telah mendakwa bahawa plaintif telah memulakan tindakan ini dan tentunya memohon injunksi interim terhadap defendan-defendan secara niat buruk. Mahkamah ini tidak boleh berdasarkan keterangan afidavit sahaja membuat kesimpulan tersebut berkenaan dengan bona fides atau mala fides pihak-pihak kepada tindakan ini. Berkenaan dengan beban pembuktian mala fides dalam kes ini terletak kepada defendan, kemudiannya mengambil
- I** kebiasaan dan kelainan keadaan meminta deponent afidavit plaintif dan atau plaintif sendiri menghujahkan isu mala fide semasa pemeriksaan balas semasa perbicaraan kes ini. Untuk ketika ini, *status quo* pihak-pihak perlu dikekalkan dengan membenarkan injunksi interlokatori seperti mana yang dipohon oleh plaintif (lihat perenggan 36).

- (7) Perintah yang dipohon oleh defendan pertama menjadikan penggunaan plaintif ke atas semua jentera dan kelengkapan atas tanah dirampas. Ini menyebabkan perniagaan plaintif menjadi terhenti secara mendadak dan dengan teruk memprejudiskan milikan plaintif. Ianya mestilah diingatkan bahawa adalah defendan yang memberikan plaintif pemilikan kepada kesemua jentera dan kelengkapan oleh itu plaintif boleh menjalankan perniagaan mereka di sana (lihat perenggan 42).]

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Notes

For cases on interlocutory injunction, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2867–2982.

For a case on principles to be applied in granting injunction, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 3166.

C

Cases referred to

- Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326 (refd)
- Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 (refd)
- American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (refd)
- Attorney-General v TS Gill & Son Pty Ltd* [1926] VLR 414 (refd)
- Attorney-General (HK) v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114 (refd)
- Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271 (refd)
- Beecham Group Ltd v Bristol Laboratories Pty Ltd* [1968] 118 CLR 618 (refd)
- Beese v Woodhouse* [1970] 1 WLR 586 (refd)
- British Airways Board v Laker Airways Ltd* [1985] AC 58 (refd)
- Broadmoor Special Hospital Authority v Robinson* [2000] QB 775 (refd)
- Canadian Medical Laboratories Ltd v Windsor Drug Store Inc* [1992] 99 DLR (4th) 559 (refd)
- Crabb v Arun District Council* [1976] Ch 179 (refd)
- Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 181 (refd)
- Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892 (refd)
- George Whitechurch Ltd v Cavanagh* [1902] AC 117 (refd)
- Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271 (refd)
- Hallett's Estate, Re* [1880] 13 Ch D 696 (refd)
- Greasley v Cooke* [1980] 1 WLR 1306 (refd)
- Harriman v Northern Securities Co* [1904] 132 F 464 (US) (refd)
- Hughes v Metropolitan Ry Co* [1877] 2 App Cas 439 (refd)
- Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 (refd)
- Legione v Hateley* [1983] 152 CLR 406 (refd)
- Mc Mahon v Ambrose* [1987] VR 817 (refd)
- Manks v Whiteley* [1912] 1 Ch 735 (refd)
- Mars Equity Sdn Bhd v Tis 'Ata' Ashar Sdn Bhd* [2006] 4 MLJ 302 (refd)
- Mercedes Benz AG v Leiduck* [1996] AC 284 (refd)
- Munro v Wivenhoe and Brightlingsea Ry Co* [1865] 4 De GJ & S 723 (refd)
- Nesbitt v Meyer* [1818] 1 Swan 223 (refd)
- New Brunswick and Canada Railway and Land Co Ltd v Muggeridge* [1859] 4 Drew 686 (refd)

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- A** *PPES Resort Sdn Bhd v Keruntum Sdn Bhd* [1990] 1 MLJ 436 (refd)
Plimpton v Spiller [1876] 4 Ch D 286 (refd)
Elwes v Payne [1879] 12 Ch D 468 (refd)
Preston v Luck [1884] 27 Ch D 497 (refd)
Proctor v Bayley [1889] 42 Ch D 390 (refd)
- B** *Ramsden v Dyson* [1866] LR 1 HL 29 (refd)
Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana [1983] 2 AC 694 (refd)
Seawell v Webster [1859] 29 LJ Ch 71 (refd)
Shamsudin bin Shaik Jamaludin v Kenwood Electronics Technologies (M) Sdn Bhd [1999] 3 MLJ 438 (refd)
- C** *Societe Generale & Ors v City Holdings (Pte) Ltd & Anor* [1991] 2 MLJ 212 (refd)
South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provinciën' NV, South Carolina Insurance Co v Al Ahlia Insurance Co And Another [1987] 1 AC 24 (refd)
Smith and Fawcett Limited, Re [1942] 1 Ch 304 (refd)
- D** *Stocker v Wedderburn* [1857] 3 K & J 393 (refd)
Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633 (refd)
Tan Suan Choo v Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 (refd)
Tailby v Official Receiver [1888] 13 App Cas 523 (refd)
Tito v Waddell (No 2) [1977] Ch 106 (refd)
- E** *Udall v Capri Lighting Ltd* [1988] QB 907 (refd)
Walters v Northern Coal Mining Co [1855] 5 De GM & G 629 (refd)
Waltons Stores (Interstate) Ltd v Maher [1988] 164 CLR 387 (refd)
Western v Perrin [1814] 3 Ves & B 197 (refd)
Wilson v Northampton and Banbury Junction Railway Co [1874] 9 Ch App 279 (refd)
Wolverhampton and Walsall Ry Co v London and NW Ry Co [1873] LR 16 Eq 433 (refd)
- F**

Legislation referred to

Specific Relief Act 1950 ss 50, 51, 52, 53, 54

- G** *S Nanthabalan (Noorliza Rasool Khan with him) (Zul Rafique & Partners) for the plaintiffs.*
Douglas Yee (Douglas Yee) for the defendants.

Abdul Malik Ishak J:

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- I** [1] Enclosure 4 is the plaintiffs' application for an interim interlocutory injunction against the defendants. Whereas encl 26 is the first defendant's application for a mandatory injunction against the plaintiffs. The terms of the mandatory injunction sought by the first defendant are in effect the exact opposite of the orders sought by the plaintiffs in encl 4.

[2] By way of encl 4, the plaintiffs sought for the following orders:

- (1) that upon the Plaintiffs by their Counsel undertaking to abide by any order this Honourable Court or a Judge may make as to damages in the case the Court or a Judge

should hereafter be of the opinion that the Defendants shall have sustained any by reason of this order which the Plaintiffs ought to pay:

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1.1. an order of injunction against the Defendants and each of them whether by themselves, their agents, servants, directors or otherwise howsoever be restrained from obstructing and/or interfering in any manner whatsoever with the Plaintiffs' peaceful and quiet enjoyment, and/or from taking possession, entering into, occupying, interfering with or remaining on the whole or any part, of the lands held under Title No. H.S. (D) 107226, 107227 and 107228 No. P.T. 119, 120 and 121, Seksyen 92A, Mukim Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan (previously held under Title P.N. No. 27396, 27397 & 133, Lot No. 127, 128 & 18, Mukim Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan) and the Factories situated thereon together with all the Fixtures, Fittings, Machinery and/or Equipment whether movable or immovable located therein and more specifically particularised in the Schedule 'A' annexed to the Writ of Summons; and

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1.2. an order of injunction against the Defendants and each of them whether by themselves, their agents, servants, directors or otherwise howsoever be restrained from transferring, assigning, charging and/or dealing with in any manner whatsoever the lands held under Title No. HS(D) 107226, 107227 and 107228 No PT 119, 120 and 121, Seksyen 92A, Mukim Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan (previously held under Title PN No 27396, 27397 & 133, Lot No. 127, 128 & 18, Mukim Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan) and the Factories situated thereon together with all the Fixtures, Fittings, Machinery and/or Equipment whether movable or immovable located therein and more specifically particularised in the Schedule 'A' annexed to the Writ of Summons;

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(2) that the parties be at liberty to apply;

(3) that costs of this application be costs in the cause;

(4) that such further and/or other relief as this Honourable Court deems fit and proper to be granted; and

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(5) that this application be fixed for inter partes hearing.

[3] And by way of encl 26, the first defendant pursuant to

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Order 29 of the Rules of the High Court, 1980 and/or under the inherent jurisdiction of this Honourable Court, and on the undertaking of the first defendant to comply with any order as to damages that this Honourable Court may make in the event that this Honourable Court shall hereafter be of the opinion that the plaintiffs shall have sustained any damage by reason of this Order, for the following orders, pending the disposal of this suit:

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(a) an order that the Plaintiffs, whether by themselves, servants or agents or any of them or otherwise, within three days from the date of this order, deliver up the 39 Machinery and Equipment listed in Annexure 'A' hereto ('39 Machinery and Equipment') to the first defendant, failing which, the plaintiffs, whether by themselves, servants or agents or any of them or otherwise, be restrained from preventing, obstructing or interfering in any way the first defendant removing and taking possession, custody and control of the 39 Machinery and Equipment;

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(b) an order that the plaintiffs, whether by themselves, servants or agents or any of them or otherwise, within three days from the date of this order, deliver up the Other Machinery and Equipment listed in Annexure 'B' ('Other Machinery and Equipment')

- A** hereto to the first defendant, failing which, the plaintiffs, whether by themselves, servants or agents or any of them or otherwise, be restrained from preventing, obstructing or interfering in any way the first defendant removing and taking possession, custody and control of the Other Machinery and Equipment;
- (c) there be liberty to apply;
- B** (d) costs of the application; and
- (e) such further or other relief as this Honourable Court deems fit and just.

BACKGROUND FACTS

- C** [4] The plaintiffs' cause of action is for breach of contract on the part of the defendants based on the conduct of the defendants which amounts to a breach of or a repudiation of two sale and purchase agreements ('SPAs') both dated 27 August 2004 entered into between the first defendant and the third plaintiff. The SPAs are for the purchase by the third plaintiff from the first defendant the following items:
- D** (a) lands held under PN 27396, Lot 127, Mukim Bandar, Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan and PN 27397, Lot 128, Mukim Bandar, Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan and PN 133, Lot 18, Mukim Bandar, Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ('the lands');
- E** (b) factory situated on the lands; and
- (c) machinery and equipment located on the lands.
- F** [5] Based on the defendants' various representations and the delay in the completion of the SPAs, on or about 15 January 2005, the defendants allowed the plaintiffs to take possession of the lands, the factory and the machinery and equipment as well as other associated accessories and to utilise the same for the plaintiffs' business.
- G** [6] Now, after the plaintiffs had taken possession of the lands, the factory and the machinery and equipment, the defendants caused notices to be issued to their customers that with effect from 17 January 2005 all future correspondences and new orders are to be sent to the second plaintiff.
- H** [7] The defendants through the third defendant acted in a manner that induced the plaintiffs to rely on his representations and the plaintiffs took possession of the lands, the factory and the machinery and equipment and thereafter commenced their business there forthwith. An equitable estoppel may arise and the conventional conditions to be fulfilled are, firstly, that there must be an express or implied representation that the plaintiffs will not rely on the legal rights in question (*Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326; and *Legione v Hateley* [1983] 152 CLR 406). But, it must be emphasised that the representation must be sufficiently clear in that it is reasonably understood in the material sense by the plaintiffs (*George Whitechurch Ltd v Cavanagh* [1902] AC 117; and *Legione v Hateley*), or which is intended by the third defendant to be so understood and is in fact so understood by the plaintiffs. Secondly, the plaintiffs must have altered their position in reliance on
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that representation (*Greasley v Cooke* [1980] 1 WLR 1306). Thirdly, it would be inequitable that the third defendant should be permitted to resile from his representation, in whole or in part, without the imposition of certain conditions (*Hughes v Metropolitan Ry Co* [1877] 2 App Cas 439; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694; and *Waltons Stores (Interstate) Ltd v Maher* [1988] 164 CLR 387).

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[8] It must be borne in mind that, at all material times, the third defendant was the alter ego and/or the controlling mind and will of the first and the second defendants.

[9] Things did not turn out well. Without any prior notice, warning or indication whatsoever the defendants evinced an intention to breach the SPAs and/or not to proceed with the SPAs by causing the issuance of three letters dated 24 June 2005 and 29 June 2005 through their solicitors Messrs Lee Hishammuddin Allen Gledhill. By those three letters, the defendants purported to:

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- (a) terminate the plaintiffs' right to use the machinery and equipment;
- (b) terminate the plaintiffs' right to occupy the lands;
- (c) demand that the plaintiffs ceased using the said machinery and equipment and to deliver possession of the same to the defendants; and
- (d) demand that the plaintiffs deliver vacant possession of the lands.

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[10] The parties agreed to discuss a settlement and negotiations went on between them. Unfortunately, the settlement fell through and Messrs Lee Hishammuddin Allen Gledhill have discharged themselves.

[11] These so called unwarranted actions on the part of the defendants have compelled the plaintiffs herein to institute the present action and the main relief sought by the plaintiffs in the writ is for an order of specific performance of the SPAs. That the remedy of specific performance is the appropriate remedy has been so stated by Edgar Joseph Jr SCJ in *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633. There at pp 666 to 667, his Lordship made these observations:

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In *Oon Hock Lai & Anor v Lee Kok Leong* [1990] 1 CLJ 951, which was a purchaser's action for specific performance of a contract for the sale of land and the construction of a house thereon, where each party blamed the other for having committed a breach of contract by the defendant, Lim Beng Choon J had occasion to consider most of the provisions aforesaid, and having scrutinized the evidence with a view to determining the nature of the breaches alleged, the circumstances under which the alleged breaches occurred and whether it was the plaintiff's act or conduct that had evinced an intention not to be bound by the agreement, concluded that the plaintiff was entitled to an order for specific performance and damages and a declaration that the defendant's purported rescission of the contract was null and void.

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Jones and Goodhart on Specific Performance (1986) at p 20 have this to say:

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The mere fact that a contract contains a liquidated damages clause, or a clause of a similar nature, is not generally an admission that damages are an adequate remedy or that one party has an option to pay or perform (see *Howard v Hopkyns* [1742] 2 Atk 371; *Crutchley v Jerningham* [1817] 2 Mer 502; *Long v Bowring* [1864] 33 Beav 585; *Robb v Green*

- A** [1895] 2 QB 315). Exceptionally, the court may reach the opposite conclusion: *Leogh v Lillie* [1860] 6 H & N 165; specific performance will nonetheless be granted if it is the appropriate remedy. Conversely, if the parties stipulate that specific relief should be the remedy, it is a recognition that they regard damages as inadequate; but this does not oust the court's discretion to refuse specific relief if it thinks damages are in fact an adequate remedy (see *Warner Bros v Nelson* [1937] 1 KB 209 at pp 220–221, per Branson J)
- B**
- C** In principle, therefore, the court has a discretion to order specific performance and decree damages in favour of a party. Land is always deemed to have a special value of loss, which may not be adequately compensated by damages. The evidence adduced also discloses that D2 had put in a tremendous amount of work and labour and also expended considerable sums of money in discharge of its obligations under the joint-venture agreement until they were wrongfully and without just cause excluded from the site by force of arms, as it were, by agents or servants of the plaintiff. There is, therefore, considerable justification for invoking the doctrine of substantial performance in favour of D2, and I so hold.
- D** In *Jania Beevi v Govindaswami* AIR 1967 Mad 369, it was held that where the subject matter of the agreement consisted of a partly completed building and the agreement itself did not contain specific details relating to the proposed construction, the court might grant specific relief.
- E** In *Kow Lup Piow & Ors v Lee Soh Hua* [1983] 1 MLJ 304, a purchaser's action for specific performance in respect of a contract for the sale and purchase of land at a price of RM700,000 which the plaintiff had intended to develop, the High Court, apart from decreeing specific performance, had ordered the defendant to pay RM50,000 damages for wrongful termination of the contract after taking into consideration the fact that it was well over five years since the defendant broke the contract, thus bringing the plaintiff's development project to a standstill for several years.
- In all circumstances, I consider that this is an appropriate case where I must not only decree specific performance but also award compensatory damages, in favour of D2.
- F**
- [12]** [12] In *Mars Equity Sdn Bhd v Tis 'Ata' Ashar Sdn Bhd* [2006] 4 MLJ 302, Gopal Sri Ram JCA writing for the Court of Appeal aptly said at pp 307–308 of the report:
- G** Section 55 is, of course of general application when it speaks of the promisor having to pay compensation to the promisee. But, whether compensation is sufficient in a given case depends on the subject matter of the contract. Here the subject matter is land. A breach of a contract relating to land is rebuttably presumed to be irremediable by monetary compensation. (Section 11(2) Specific Relief Act 1950. See also, *Zaibun Sai bte Syed Ahmad v Loh Koon May* [1982] 2 MLJ 92). Having regard to the evidence before the High Court
- H** I find no material going anywhere near to rebutting the presumption housed in s 11(2). Hence, the appropriate remedy in this case is specific performance.
- I** **[13]** It is trite law that the remedy of specific performance is an equitable remedy and the court will grant it to the plaintiff if it is just to do so. As of right, a plaintiff is not entitled to specific performance. The court will only grant specific performance instead of damages when it can by that means do more perfect and complete justice (per Lord Selborne in *Wilson v Northampton and Banbury Junction Railway Co* [1874] 9 Ch App 279 at 284). Of course, the discretion to grant specific performance cannot be exercised capriciously. It must be exercised in accordance with the established principles (*Re Hallett's Estate* [1880] 13 Ch D 696 at 710, per Jessel MR).

According to Kindersley VC in New Brunswick and *Canada Railway and Land Co Ltd v Muggeridge* [1859] 4 Drew 686 at 698–699, the court will not grant specific performance if it is idle and nugatory to do so and his Lordship also expressed the view that the court will not make any order in vain. For instance, in *Seawell v Webster* [1859] 29 LJ Ch 71 at p 73, Kindersley VC aptly said:

Put the extreme case of a vendor burning a title deed: the court could not make a decree that he should deliver it up, and be imprisoned if he does not.

[14] I will now refer to the case of *Udall v Capri Lighting Ltd* [1988] QB 907. In that case, at the date of the hearing, it was impossible for a solicitor to perform an undertaking that was previously given that he would ensure that the defendant's directors would provide security for its liabilities. The court was reluctant to order specific performance. But, in the exercise of its inherent jurisdiction, the court could compensate a person who had thereby suffered loss if it was shown that the solicitor's failure amounted to professional misconduct or serious dereliction of duty.

[15] Similarly it would be futile to grant specific performance of an agreement to grant a lease for a period of time which had already expired (*Nesbitt v Meyer* [1818] 1 Swan 223; *Stocker v Wedderburn* [1857] 3 K & J 393; *Walters v Northern Coal Mining Co* [1855] 5 De GM & G 629; and *Western v Perrin* [1814] 3 Ves & B 197). By a majority, the Supreme Court of Victoria in the case of *Mc Mahon v Ambrose* [1987] VR 817 held that it had no jurisdiction to order specific performance of an agreement to grant a lease for a term which had expired before proceedings were commenced or to award equitable damages. In *Tito v Waddell (No 2)* [1977] Ch 106, Megarry VC denied specific performance of an obligation to replant selected plots on an island with coconuts, pandanus and almonds because his Lordship could not see any utility in doing so. It would be a 'sheer waste of time and money'.

[16] Returning to the facts of the case, it must be noted that the third plaintiff as the purchaser has paid substantial amounts under the SPAs. Particulars of such payments can be seen at para 8 of page 18 of encl 3 and at para 21.2 of p 21 of the plaintiff's second affidavit. Subsequent to the commencement of this action, the defendants caused two letters of demand both dated 10 August 2005 to be issued by their erstwhile solicitors to the third plaintiff's solicitors demanding the payment of:

- (a) the purported balance deposit sum of RM430,000 under the said lands SPA; and
- (b) the purported balance of the purchase price of RM3,150,000 under the said machinery and equipment SPA.

[17] By a letter dated 17 August 2005, the plaintiffs denied the first defendant's claims but nonetheless in good faith paid the sums demanded by the defendants notwithstanding the plaintiffs' position that such sums are not due under the said SPAs. It is said that as the purchaser, the third plaintiff has complied with all its obligations under the SPAs. But the balance of the purchase price has not been paid as the time for payment has not arrived yet. It is said that the defendants by their inaction have caused delays to the completion of the SPAs. The defendants have not

- A** to date taken the necessary steps to obtain the consent of the State Authority for the sale of the lands. The defendants, however, have evinced an intention not to proceed with the SPAs. It is also said that the first defendant has not performed its obligations under the SPA for the purchase of the lands.
- B** [18] Without notice to the defendants, the plaintiffs then initiated the present action and the plaintiffs also applied for by way of encl 4 and obtained on 15 July 2005 an ex parte interim injunction against the defendants, essentially restraining the defendants from:
- C** (i) obstructing and/or interfering with the plaintiffs' possession of the lands and the machinery and equipment particularised at Schedule 'A' to the writ of summons; and
- (ii) transferring, assigning, charging and/or dealing with the lands and the machinery and equipment particularised at Schedule 'A' to the writ of summons.
- D** [19] Even after the plaintiffs had obtained the ex parte interim injunction against the defendants on 15 July 2005, it is said that the first defendant still did not terminate the said lands SPA and the said machinery and equipment SPA but instead the first defendant instructed its solicitors Messrs Douglas Yee to demand for
- E** payment from the third plaintiff the sums due under the said lands SPA and the said machinery and equipment SPA respectively in the hope of achieving completion of the SPAs. It is said that the third plaintiff did not comply with the first defendant's demands and, consequently, the first defendant had no alternative but to terminate the SPAs on 23 August 2005. The first defendant had no alternative but to apply as
- F** per encl 26 for a mandatory injunction to essentially require the plaintiffs to deliver up:
- (a) the thirty nine – 39 machinery and equipment listed in Annexure 'A' to encl 26; and
- (b) the other machinery and equipment listed in Annexure 'B' to encl 26.
- G** THE DEFENDANTS' ALLEGATIONS AND THE PLAINTIFFS' REBUTTALS
- [20] The defendants made a host of allegations and the plaintiffs have responded to the allegations. I shall now list down the defendants' allegations and the plaintiffs' response to those allegations:
- H** (a) It is alleged that all the payments made by the plaintiffs thus far under the said SPAs as contended by the plaintiffs are not towards the said SPAs and that the plaintiffs have not made the payments that are due and payable thus far under the said SPAs. The response by the plaintiffs can be seen at paragraph 15 and the sub-paras thereunder and para 21 and exh YTC-26, YTC-28 and YTC-29
- I** of encl 17. In their response, the plaintiffs said that on various occasions through the years of dealings between the first and the third defendants with the plaintiffs, the third defendant had sought financial help from Billy Yap and the first plaintiff. It was later agreed by the third defendant as an officer of the first defendant that the monies advanced by the first plaintiff to the first and/or

- the third defendants due and payable will be taken into account towards the purchase price of the said SPAs. The defendants have not at any time disputed that the monies were received by them. The defendants have by two letters dated 15 January 2005 addressed to OCBC Bank acknowledged receipt of monies paid by the plaintiffs to the defendants. A
- (b) It is alleged that payments under the said SPAs have not been paid by the plaintiffs. By way of para 21 and the sub-paragraphs thereunder of encl 17, the plaintiffs responded and said that notwithstanding the payments made by the plaintiffs towards both the said SPAs to date, it is the plaintiffs stand that cl 2 of the machinery and equipment SPA must be read in totality. In fact, where there are several documents forming part of the same transaction and executed contemporaneously, it is a settled rule of construction that all those documents must be read together as if they are one (*Manks v Whiteley* [1912] 1 Ch 735). Now, even though the completion date of the machinery and equipment SPA is eight months from the date of the agreement dated 27 August 2004, the said machinery and equipment SPA is subject to the completion of the purchase of the lands with the factory thereon. To date, the said lands SPA has not been completed due to the acts and/or omissions on the part of the first defendant in not executing all the necessary documents and to obtain the requisite consent of the State Authority for the disposal of the said lands. Pursuant to cl 3(b) of the said lands SPA, the vendor shall the soonest possible from the date of the execution of the lands SPA apply to the relevant authority for the State Authority's consent and shall do all acts necessary and required in order to obtain the State Authority's consent in favour of the purchasers. To date, the defendants have not obtained the requisite consent from the State Authority. B C D E
- (c) It is alleged that the sale of the lands is below the market value. The plaintiffs responded and said that the SPAs were signed in accordance to the fair market value as reflected at paragraphs 12 and 13 of encl 20 and exh YTC-32 in encl 20. F
- (d) It is alleged that the contents of the two letters dated 15 January 2005 issued by the first defendant and/or the third defendant to OCBC Bank Berhad are both untrue. The plaintiffs responded at paragraph 16 and the sub-paragraphs thereunder of encl 17 and averred that the third defendant was fully aware of the contents of these letters. The third defendant had signed these letters as a director and as the alter ego of the first defendant and is fully responsible for his actions. G
- (e) It is alleged that the vouchers exhibited at exh 'YTC-26' were executed by the third defendant at the request of Billy Yap and that the particulars contained therein are untrue and they do not evidence any payment made by the plaintiffs. To this allegation, the plaintiffs responded in this way. That the third defendant is an educated man and is in possession of his senses and knows fully well the consequences of executing the vouchers. The third defendant is estopped from contending that he is not bound by these vouchers. All these averments can be seen at para 15.4 of encl 17. H I
- (f) It is alleged that the delays in the said SPAs is due to the plaintiffs not making payments. In response, the plaintiffs have this to say. That the plaintiffs have

- A** made all the necessary payments due under both the SPAs. The delays in the SPAs is due to the requirement that the defendants have to take the necessary steps to obtain the requisite consent from the State Authority in order to complete the sales. The balance purchase price of RM7.2m is only payable within four months from the date of receipt of the consent from the State Authority. It is said that the balance of the purchase price is not due and payable. The delay caused by the third defendant had caused harm and damage to the plaintiffs and that cannot be compensated with damages because the redemption sum for the said lands together with the said factory is escalating rapidly day by day. All these averments are stated in paras 13 and 14 and the sub-para thereunder of encl 17.
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- C** (g) It is alleged that by reason of the purported breaches of the said SPAs by the plaintiffs, the fundamental terms of the said SPAs are breached and this allowed the first defendant to terminate the said SPAs (see exh YTC-30 of encl 17). By way of a rebuttal, the plaintiffs say that they have made all the requisite payments due under the SPAs. On various occasions through the years of dealings between the first defendant and the third defendant and the plaintiffs, the third defendant had sought financial help from Billy Yap and the first plaintiff. It was later agreed by the third defendant as an officer of the first defendant that the monies advanced by the first plaintiff to the first defendant and/or the third defendant are due and payable and will be taken into account towards the purchase price of the said SPAs. The defendants have not at anytime disputed that the monies were received by them (see the averments at para 15 and the sub-paragraphs thereunder as well as exh YTC-26 of encl 17).
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- (h) It is alleged that the subject matter of the machinery and equipment SPA is limited only to the thirty-nine (39) items listed at Annexure '1' to the machinery and equipment SPA and not to all the machinery and equipment located on the said lands as stated by the plaintiffs. The response by the plaintiffs can be seen in paragraph 10 and the sub-paragraphs thereunder of encl 17 as well as paragraph 7 of encl 20 and this was what the plaintiffs say. That the acquisition is limited only to the identified operating assets of the Foresight Group consisting of the lands, the factory, the machinery and associated accessories. The machinery and equipment SPA clearly states that the machinery and equipment forming the subject matter of the acquisition consists of those items as itemised in Annexure '1' of the machinery and equipment SPA and shall include all other relevant fixtures and fittings situated in the vendors premises, viz, the said lands. In fact, the third defendant showed the plaintiffs all the machinery and equipment in the factory which were all subject to the sale during a tour of the factory. The third defendant then caused Annexure '1' to the machinery and equipment SPA to be prepared and he represented that Annexure '1' was a list of all the machinery and equipment on the lands. Now, the defendants evinced an intention to depart from the understanding between the parties as exhibited at exhibit 'YTC-4' of encl 3.
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- I** It is germane to mention that an equitable estoppel may go very far as to give rise to the acquisition of a new interest in property. In a situation of say, an owner of the land stands idly by particularly when another person incurs expenditure or detriment and the owner knows that that other person believes that he is, or will be, entitled to an interest in that land, a court with equitable

jurisdiction will be so bold as to require the owner to give effect to that belief by not asserting inconsistent rights or even by transferring the legal title. This proposition can be distilled from the speech of Lord Kingsdown in *Ramsden v Dyson* [1866] LR 1 HL 29. This proposition has been expanded in *Crabb v Arun District Council* [1976] Ch 179; and *Attorney-General (HK) v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114. This equity is often described as proprietary estoppel. It arises in this kind of situation. Where the parties have so acted that it would be unconscionable for the owner to assert the inconsistent rights or, for instance, not to transfer title, then the circumstances of standing by on the one hand and the reliance by the other would be a relevant consideration. Other considerations like unfairness and laches are also relevant (*Crabb v Arun District Council*; and *Attorney-General (HK) v Humphreys Estate (Queen's Gardens) Ltd*). Brennan J., sitting in the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher* [1988] 164 CLR 387 at pp 428 to 429 aptly said:

In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.

- (i) It is alleged that pursuant to the understanding between the parties as evident from a letter dated 2 July 2004 from the first plaintiff to the defendants, the third defendant was entitled to a 30% shareholding in the third plaintiff upon its incorporation but has not been allocated any shares in the third plaintiff. By way of a rebuttal, the plaintiffs say that the allocation of a 30% shareholding to the nominee of the third defendant is conditional on the term of the understanding that the third defendant is to provide a profit after tax guarantee of an aggregate of RM4.5m for three years. The third defendant has not given the requisite profit guarantee and has not paid his portion of the proposed paid up capital of RM2.5m amounting to RM750,000. As such, the third defendant is not entitled to any shares in the third plaintiff. In any event, the understanding between the parties has since been aborted by a letter dated 28 August 2004 exhibited as exh 'YTC-9' of encl 3. All these averments are set out in paras 11 and 12 and the paras thereunder of encl 17 as well as paras 8 and 10 of encl 20.

- A** (j) It is alleged by the defendants that the letter dated 28.8.2004 issued by the first defendant to the first plaintiff pursuant to which the understandings between the parties were aborted is fraudulently created by the plaintiffs for the purposes of the present litigation and it is further alleged that Loke Meng Keong who issued the said letter as a director of the first defendant had no authority to issue the said letter. By way of a rebuttal, the plaintiffs say that the allegations are misleading and they seek to distort the true understanding between the parties. Loke Meng Keong was, at all material times, a director of the first defendant. The third defendant has held the said Loke Meng Keong out as a director of the first defendant with authority to act for the first defendant and/or the second defendant. In fact, the said SPAs were executed by both Loke Meng Keong and the third defendant. It is inconceivable how Loke Meng Keong can have the authority to act for the first defendant and the second defendant on one occasion and not on the other occasion. The third defendant as a co-director of the first and the second defendants knew and/or ought to have known of the existence of this letter (see the averments at paras 12.1 to 12.5 of encl 17 and paras 4.1, 4.2 and 4.3 of encl 21 as well as para 9 of encl 20).
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- E** (k) It is alleged that one Billy Yap representing the plaintiffs had informed the third defendant that the various reminders sent by the purchaser's solicitor to the first defendant requiring the first defendant to fulfill their obligations under the SPAs were merely formalities which the third defendant need not comply. By way of a rebuttal, the plaintiffs say that the first defendant and/or the third defendant opted at their own volition not to appoint solicitors to represent them in respect of the SPAs as they did not want to waste money by paying legal fees. According to the plaintiffs, the defendants knew and fully understood the nature and consequences of all their deeds and actions in respect of the SPAs. These rebuttals can be seen in para 19 of encl 17.
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- G** (l) It is alleged by the defendants that all the letters and documents issued by the first defendant pursuant to the SPAs were orchestrated by Billy Yap and that their contents are untrue. The plaintiffs by way of a rebuttal say that the third defendant at all times as the directing mind and will and as alter ego of the first defendant orchestrated all these misdeeds. It is said that third defendant is an educated man and a man fully in possession of his senses and faculties and knew and/or orchestrated all these misdeeds. The first defendant and/or the third defendant opted at their own volition not to appoint solicitors to represent them in respect of the SPAs as they did not want to waste money by paying legal fees. The defendants knew and fully understood the nature and consequences of all their deeds and actions in respect of the SPAs. Billy Yap did assist the third defendant in the preparation of these documents. It was done at the third defendant's request and the third defendant being a prudent and shrewd businessman of 30 years standing always verified the contents of the documents. He never signed letters immediately but always signed them later and returned them to Billy Yap. And Billy Yap always explained the contents of the documents he prepared for the defendants to the third defendant, his wife, sons and daughters who were all employed with the first plaintiff. All these averments by the plaintiffs can be seen in paras 19.5 and 19.6 of encl 17.
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- (m) It is alleged by the defendants that the permission granted by the first defendant to the second plaintiff was given in good faith and out of goodwill and not pursuant to the said SPAs which could be revoked by the first defendant at anytime. By way of a rebuttal, the plaintiffs say that they took possession of the said lands, the said factory and the said machinery and equipment pursuant to the SPAs. Such possession was given by the first defendant due to the delay in the completion of the said SPAs pursuant to the re-alienation of the said lands by the land office (see exh 'YTC-11' of encl 3). It was, at all times, the intention of the parties that the said possession was pursuant to the said SPAs. The first defendant issued notices to their customers for future orders to be referred to the plaintiff in view of the fact that the first defendant was ceasing its business upon the sale of the said assets to the first plaintiff. The third defendant intended at the relevant time to acquire the shareholdings in the third plaintiff subject to a profit guarantee and/or to enter into employment with the third plaintiff. The first defendant and/or the third defendant later opted not to pursue any of these ideas. All these averments can be seen at paragraph 17 and the sub-paragraphs thereunder of encl 17 and exh 'YTC-18' of encl 3 as well as para 11 of encl 20. A
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- (n) It is alleged by the defendants that all the misdeeds of the defendants as pleaded by the plaintiffs in the Statement of Claim were committed by the third defendant at the request and instigation of Billy Yap. By way of a rebuttal, the plaintiffs say that Billy Yap did assist the third defendant in the preparation of these documents. It was done at the third defendant's request. It is said that the third defendant, as an intelligent businessman, should be held liable for his actions (see the averments at paras 19.5, 19.6 and 19.8 of encl 17 and para 15 of encl 20). E
- (o) It is alleged by the defendants that due to the purported delays on the part of the plaintiffs, the first defendant has suffered a loss of income, loss of business opportunity, goodwill and reputation in the circumstances. By way of a rebuttal, the plaintiffs say that the first defendant granted the plaintiffs possession of the said lands, factory and the said machinery and equipment due to the delays in the said SPAs. The holding over of possession was pursuant to the SPAs and not pursuant to any good deed or charitable act by the first defendant. Any loss suffered by the first defendant due to the holding over of possession and in ceasing its business, which is denied, has been factored into the said SPAs. The first defendant has caused the delay in the completion of the said SPAs and has to bear whatever loss, if any, it has suffered thereby. The third plaintiff has acquired beneficial ownership and interest in the lands, factory and the said machinery and equipment pursuant to the said SPAs and having paid a total of RM5,013,568 to date. The first defendant by its inactions are preventing the transfer of legal ownership in the said assets to the third plaintiff from the said lands and the said factory by reason of their dominant position as an owner over the plaintiffs. The status quo of the parties should be preserved until the plaintiffs' suit herein for redress from this court is heard and determined. All these averments can be seen at para 31 and the sub-paragraphs thereunder of encl 17. F
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- A** (p) The defendants alleged that the Power of Attorney dated 8 June 2005 was never executed by the third defendant before an Advocate and Solicitor. The plaintiffs say otherwise and said that the third defendant executed the Power of Attorney before an Advocate and Solicitor together with Lok Meng Keong as reflected at para 19.7 of encl 17, paragraph 4.4 of encl 21 and para 18 of encl 20.
- B**
- (q) It is alleged that the first and the second defendants are separate legal entities and that the third defendant was and is a director of the first and the second defendants. By way of a rebuttal, the plaintiffs had this to say. That the first directors of the first and the second defendants were the third defendant and one Lok Man Yue. The latter resigned in the year 2000. Thereafter the first defendant caused a Form 49 backdated to 15 June 2000 but filed on 7 October 2004 pursuant to which the third defendant is purported to have ceased as a director of the first and the second defendants with effect from 15 June 2000. As such, the position of the third defendant as a director of the first and the second defendants is dubious and the validity of the documents he executed purportedly as a director is questionable. The third defendant never indicated the entity he was dealing for at any particular time. All these averments can be seen at para 6 and the sub-paragraphs thereunder as well as paras 7, 8 and 9 of encl 17.
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- E** (r) It is alleged that the injunction sought by the plaintiffs is misconceived and baseless. In rebuttal, it is said that the injunction sought by the plaintiffs herein is necessary to preserve the status quo of the parties herein pending the trial of this matter. It is also said that there are many serious issues to be tried in this case and that the balance of convenience lies in the granting of an injunction (see the averments at para 54 of encl 3 and para 28 of encl 17).
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THE NEED FOR AN INJUNCTION IN FAVOUR OF THE PLAINTIFFS

- G** [21] It is argued that the injunction sought by the plaintiffs' herein is necessary so that the plaintiffs can carry on their business and duly fulfill all their obligations to their customers. The injunctive order is said to be necessary in order to prevent the defendants from entering into the premises or in interfering in any way with the plaintiffs' business. It is argued that if the defendants are not restrained, the plaintiffs would suffer irreparable loss that cannot be adequately compensated with damages.
- H** The plaintiffs advanced the following reasons for an injunction to be granted in their favour:
- (a) the plaintiffs' business will come to an abrupt halt;
- (b) the plaintiffs will not possess the necessary equipment and machinery to manufacture their goods;
- I** (c) the plaintiffs will be prevented from honouring their commitments to their clients and thereby will be liable for damages to their clients; and
- (d) the plaintiffs will suffer loss of goodwill and irreparable damage to its reputation.

[22] Every lawyer knows that an injunction is an order restraining the person to whom it is directed from performing a specified act or requiring that person to perform a specified act. The powers of the courts to grant injunctions are legion and, subject to any relevant statutory restrictions, are unlimited (*South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provinciën' NV* [1987] AC 24 at pp 44–45; and *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775). Lord Nicholls in *Mercedes Benz AG v Leiduck* [1996] AC 284 at page 308 loudly declared that, 'These are highly persuasive voices that the jurisdiction to grant an injunction, unfettered by statute, should not be rigidly confined to exclusive categories by judicial decision'. Injunctions are usually granted when it accords with equitable principles. In *British Airways Board v Laker Airways Ltd* [1985] AC 58 at 81 and in the *South Carolina Insurance Co's* case at 40, one of the main bases for the grant of injunctions is to prevent the invasion of equitable rights.

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[23] A quia timet injunction is an injunction that is granted in order to prevent an injury from occurring. In *PPES Resort Sdn Bhd v Keruntum Sdn Bhd* [1990] 1 MLJ 436, the court stated that a 'quia timet' injunction is a proceeding by which the court is able to prevent its jurisdiction from being stultified. The words 'quia timet' simply mean 'since he fears'. So if an applicant seeks an injunction before the act of the defendant has occurred then the plaintiff is said to seek a quia timet injunction. Cotton LJ in *Proctor v Bayley* [1889] 42 Ch D 390 at p 398 observed:

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The Court of Chancery said, 'Where a man threatens and intends to do an unlawful act, we will, before it is done, grant an injunction to prevent his doing it, and we will grant it where the act has been done and is likely to be repeated' — jurisdiction is simply preventive.

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The plaintiffs here are, on the facts, seeking a quia timet injunction. Contractual rights may be enforced not only by specific performance but also by way of an injunction. In the case of an injunction to enforce a contractual right, two special circumstances must be mentioned. Firstly, when questions of hardships are being considered between the parties, the fact that the defendant has voluntarily undertaken to carry out the obligations now sought to be enforced would be a relevant factor. Secondly, a question must also be posed and that would be whether the contract is the type that could be enforced by way of a specific performance. So, in all cases, where an injunction is sought in order to enforce a contractual right it is significant to enquire whether the plaintiff is entitled to obtain an order for specific performance. Orders for the specific performance of contractual rights are certainly different from orders requiring the defendant to abstain from performing certain acts. For an order of specific performance, the court may require the defendant to perform some act or acts just like the case of *Wolverhampton and Walsall Ry Co v London and NW Ry Co* [1873] LR 16 Eq 433 at p 439 where Lord Selborne observed, 'The common expression, 'specific performance', as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed. It must be borne in mind that there may be an order for a specific performance couched in general terms where the defendant would be required to perform certain obligations that are contained in the contract between the parties (*Tailby v Official Receiver* [1888] 13 App Cas 523 at p 547). I will now refer to the Specific Relief Act 1950.

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- A [24] Section 50 of the Specific Relief Act 1950 states that the granting of preventive relief is at the discretion of the court. And that relief may be by way of a temporary or a perpetual injunction. Whereas s 51 of the Specific Relief Act 1950 defines the scope of the temporary and perpetual injunctions. Section 52 of the Specific Relief Act 1950 lays down the circumstances when perpetual injunctions may be granted by the court. And s 53 of the Specific Relief Act 1950 lays down the circumstances in which the court will grant mandatory injunctions. Finally, s 54 of the Specific Relief Act 1950 lays the circumstances when the court may refuse to grant an injunction. In *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323, the court held that the statutory bar encapsulated in s 54(d) of the Specific Relief Act 1950 is confined to a perpetual or a final injunction and has no application to temporary injunctions which are governed by s 51 of the same Act.

ENCLOSURE 4

- D [25] The object of an interlocutory injunction is to protect the plaintiffs here against injury of their rights which could not be adequately compensated by damages recoverable in the action if the uncertainty is resolved in his favour at the trial. If there is a risk of substantial injury or prejudice to the plaintiffs despite any rights to damages that the plaintiffs here may have through apprehended or continuing breaches before the final hearing of the proceedings, prima facie the plaintiffs would be entitled to the grant of an interlocutory injunction. But, if it appears that interlocutory relief will cause hardship or inconvenience to the defendants or even to third parties then the court will, in exercising its discretion, decide as to where the balance of justice would lie. Of course, questions of hardship and inconvenience, which are often referred to when one uses the expression the balance of convenience, are taken into account in the broader enquiry when determining the balance of justice (*Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892; *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 181; and *Canadian Medical Laboratories Ltd v Windsor Drug Store Inc* [1992] 99 DLR (4th) 559). The question to pose when considering the balance of justice is whether it is most just in all the circumstances that the relief sought for should be granted (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396). It is here that the degree of protection that is afforded to the defendant by an undertaking of the plaintiff as to damages is often important. The court must have regard to any prejudice or injury that may be suffered through the grant or refusal of the interlocutory relief pending the hearing and the court too must have regard to the extent to which, if no interlocutory injunction is issued, it will be possible at the final hearing to compensate or provide for breaches that have already taken place. So, it is appropriate to say that the question of hardship is important and it is a relevant consideration. The court will determine the balance of justice between the parties in granting or refusing relief (*Plimpton v Spiller* [1876] 4 Ch D 286; *Elwes v Payne* [1879] 12 Ch D 468; *Attorney-General v TS Gill & Son Pty Ltd* [1926] VLR 414; *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [1968] 118 CLR 618; and *Harriman v Northern Securities Co* [1904] 132 F 464 (US)).
- I The correct test to apply would be the test as propagated by Turner LJ in *Munro v Wivenhoe and Brightlingsea Ry Co* [1865] 4 De GJ & S 723 at p 733 and that test is worded in this way:

This court when called upon to grant an interlocutory injunction will act according to the justice of the case as ascertained upon the evidence before it and according to the comparative injury which may arise from granting or withholding the injunction.

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[26] It is now the practice that in all cases where interim or an interlocutory injunction is sought for, the court must accordingly decide, 'what, on the balance of convenience, is the right order, and where lies the major risk of damage, and in particular of any irreparable damage' (*Beese v Woodhouse* [1970] 1 WLR 586 at p 591). It is ideal, at this juncture, to refer, once again, to the case of *American Cyanamid Co v Ethicon Ltd.* There Lord Diplock had this to say (see p 508 of [1975] 1 All ER 504):

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The grant of an interlocutory injunction is a remedy that is both temporary and discretionary. It would be most exceptional for your Lordships to give leave to appeal to this House in a case which turned on where the balance of convenience lay. In the instant appeal, however, the question of the balance of convenience, although it had been considered by Graham J. and decided in Cyanamid's favour, was never reached by the Court of Appeal. They considered that there was a rule of practice so well established as to constitute a rule of law that precluded them from granting any interim injunction unless on the evidence adduced by both the parties on the hearing of the application the applicant had satisfied the court that on the balance of probabilities the acts of the other party sought to be enjoined would, if committed, violate the applicant's legal rights. In the view of the Court of Appeal the case which the applicant had to prove before any question of balance of convenience arose was 'prima facie' only in the sense that the conclusion of law reached by the court on that evidence might need to be modified at some later date in the light of further evidence either detracting from the probative value of the evidence on which the court had acted or proving additional facts. It was in order to enable the existence of any such rule of law to be considered by your Lordships' House that leave to appeal was granted.

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Continuing at p 509 of the All ER report, this was what his Lordship said:

My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies.

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A [27] The court too must be satisfied that there is a serious question to be tried in the sense that the claim is not frivolous or vexatious. In *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, Gopal Sri Ram JCA writing a separate judgment aptly said at p 203 of the report:

B We begin by respectfully accepting that the correct approach to be adopted and the stages of reasoning involved in the process of arriving at the conclusion as to whether interlocutory injunctive relief should be granted or withheld are those that have been neatly summarized by Hashim Yeop A Sani J in *Mohamed Zainuddin bin Puteh v Yap Chee Seng* [1978] 1 MLJ 40. This is what that very eminent judge said in that case (at p 42):

C Firstly to discover whether the plaintiff's case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the court to take into account any tipping in the balance as revealed by affidavits.

D ... Secondly, if the plaintiffs were to succeed at the trial, whether they would be adequately compensated for the interim continuance of the defendant's activities. Conversely is the question that if the defendants were to succeed at the trial, whether they would be adequately compensated for the interim restriction on their activities which the grant of an interlocutory injunction would have imposed. The judge then considers the balance of convenience, and if the relevant factors were evenly balanced the court should grant an interlocutory injunction which would maintain the status quo. *It is said that at that stage the court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits.* (Emphasis added.)

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Continuing at pp 206–207 of the report, his Lordship Gopal Sri Ram JCA had this to say:

F To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:

G (1) he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

H (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to

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dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

- (3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

[28] In *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, Jemuri Serjan CJ (Borneo) writing for the Supreme Court aptly said at p 253 of the report:

Two prerequisites must be present before Lord Diplock's guidelines can come into play. First, the plaintiffs' case must raise serious issues to be tried. If the plaintiffs fail at that point there clearly is no case for an injunction. Secondly, the trial of the main suit is likely to take place in the sense that the plaintiffs' case shows that they are genuinely concerned to pursue the claim to trial and they are seeking the injunction as a means of holding operation pending the trial. Once it can be established that there are serious issues to be tried then the other guidelines must be invoked. The court has to consider:

- (a) whether damages are an adequate remedy;
- (b) where does the 'balance of convenience' lie; and
- (c) are there any 'special factors'.

[29] Now, once it is obvious that there are serious issues to be tried the court must consider where the balance of inconvenience lies. In *American Cyanamid Co v Ethicon Ltd*, Lord Diplock said at p 510 of the All ER report:

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing' (*Wakefield v Duke of Buccleuch* [1865] 12 LT 628; 6 New Rep 288; 11 Jur NS 523). So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

- A In *Societe Generale & Ors v City Holdings (Pte) Ltd & Anor* [1991] 2 MLJ 212, Chua J, of the High Court of Singapore at pp 227–228 said:

The factors in assessing the balance of convenience is conveniently summarized in *Modern Equity* by Hanbury and Maudsley (13th Ed, 1989) at p 716:

- B While the balance of convenience is the governing consideration, a significant factor in assessing it is the inadequacy of damages to each party. If that does not provide an answer, then other aspects of the balance of convenience will arise. If the balance of convenience does not clearly favour either party, then the preservation of the status quo will be decisive. Only as a last resort is it proper to consider the relative strength of the cases of both parties, and only then if it appears from the facts set out in the affidavit evidence,
- C as to which there is no credible dispute, that the strength of one party's case is disproportionate to that of the other.

Finally, other special factors may have to be considered in individual cases.

- D Thus it will be seen that there is a series of rules, most of which will apply only if the previous one has not afforded a solution. But, as Browne LJ stated in *Fellowes & Son v Fisher* [1976] QB 122, 129, the remedy is discretionary and the principles enunciated by Lord Diplock contain some elements of flexibility. The House of Lords cannot have intended to lay down rigid rules. They are best described as guidelines.

- E On the factor of the adequacy/inadequacy of damages, Goldrein and Wilkinson in *Commercial Litigation: Pre-Emptive Remedies* (1987 Ed) have this to say (at p 86):

Once the court has found that there is a serious issue to be tried, it should go on to consider the adequacy of the respective remedies in damages available for either party. In this regard the cases should be read in the context of the following dicta of Sachs LJ in *Evans Marshall & Co Ltd v Bertola Sa* [1973] 1 WLR 349:

- F The standard question in relation to the grant of an injunction 'Are damages an adequate remedy?' – might in the light of recent authorities, be rewritten – 'Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?

- G [30] Like all equitable remedies, the court reserves the discretion as to whether an injunction should be granted. In exercising this discretion, the court may have regard to the bona fides of the plaintiff in asking for an injunction. In *South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provinciën' NV, South Carolina Insurance Co v Al Ahlia Insurance Co And Another* [1987] 1 AC 24, the House of Lords held that the power of the High Court to grant injunctions is subject to two exceptions, namely:

- H (1) where one party to an action can show that the other party has either invaded or threatens to invade a legal or equitable right of the former; and
- (2) where one party to an action has behaved or threatens to behave in a manner which is unconscionable.

- I In the present case before me the actions of the defendants amount to an invasion of the plaintiffs' rights to remain in possession of the lands, the factory, the machinery and equipment and to conduct its business pending completion of the SPAs. There is no credible evidence before this court to demonstrate that the plaintiffs have committed any unconscionable act whatsoever.

SERIOUS ISSUES TO BE TRIED IN THIS MATTER

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[31] The defendants have raised many issues which need to be determined by this court. All these varied issues cannot be dealt with summarily. Indeed, particularly when there is a contest of affidavits it becomes necessary for this court to decline making any pronouncement as to which is the version of the disputed facts which is more believable (*American Cyanamid Co v Ethicon Ltd*). I did just that in this case.

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[32] I will now itemise the serious issues to be tried in this case, not in its order of merit:

(a) Whether the defendants have failed and/or omitted to fulfil their obligations under the said SPAs in view of the delay on the part of the first defendant in executing the necessary documents to obtain the requisite State Authority's consent notwithstanding the fact that the plaintiffs have paid all the monies due under the said SPAs?

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(b) Whether the defendants have evinced an intention not to proceed with the SPAs resulting in loss and damage to the plaintiffs that cannot be adequately compensated with damages on the facts and circumstances of this case including the fact that the plaintiffs have taken possession of the said lands and the said factory and have utilised all the machinery and equipment on the said lands for their manufacturing processes and have altered their position by reason of the possession?

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(c) Whether the defendants purported termination of the SPAs as per their solicitors' letter dated 23 August 2005 is wrongful?

(d) Whether the said machinery and equipment SPA is for the sale of all the machinery and equipment located on the said lands in view of the understanding between the parties in this case at the time the said machinery and equipment SPA was entered and particularly since the third defendant prepared annexure 1 to the said machinery and equipment SPA and represented that annexure 1 was a complete list of all the machinery and equipment located on the said lands?

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(e) Whether the plaintiffs are entitled to possession of the said lands, the factory and the said machinery and equipment or alternatively whether the said possession is pursuant to the said SPAs or otherwise as evidenced by exh YTC-11 of encl 3 whereby the first defendant and/or the third defendant had given possession of the said assets to the plaintiffs in lieu of the said SPAs and due to the delays in the re-alienation of the said lands?

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(f) Whether Lok Meng Keong was, at all times, a director of the first defendant who had the authority to execute the said SPAs and do all things relating to the SPAs including the authority to issue the letter dated 28 August 2004 exhibited as exh YTC-9 of encl 3 pursuant to which the understanding between the parties, save for the said assets, was aborted?

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(g) Whether at all material times to the said SPAs, the third defendant was and/or is a director of the first defendant and had the authority to execute the said

- A** SPAs particularly in view of the back dated Form 49 pursuant to which the third defendant ceased to be a director of the first defendant since 15 June 2000 and further whether the said SPAs are valid, binding and effective in view of the doubtful position of the third defendant's status?
- B** (h) Whether, on the facts and circumstances of this case, it is apparent that the defendants through the third defendant had attempted to commit acts to the detriment of the plaintiffs and the said SPAs with a malicious intent and/or with an intent to cause harm and damage to the plaintiffs and to jeopardise the said SPAs?
- C** (i) Whether the third defendant being an educated man in full possession of his senses and faculties was fully aware of his actions including the execution of the said SPAs and all the documents relating thereto including the letter dated 15 January 2005 issued to OCBC Bank Berhad pursuant to which the first defendant and/or the third defendant has acknowledged receipt of payments made under the said SPAs and further whether the third defendant is bound and/or estopped by his actions?
- D** (j) Whether the third defendant is entitled to any shareholding in the third plaintiff particularly since he has not paid any share capital towards the third plaintiff and he has not provided a profit after tax guarantee of an aggregate RM4.5m for three years which is a condition precedent to any issue of shares to the third defendant and/or his nominee?
- E** (k) Whether notwithstanding the payments made by the plaintiffs towards both the said SPAs to date, cl 2 of the machinery and equipment SPA must be read in totality and therefore albeit the fact that the completion date of the machinery and equipment SPA is 8 months from the date of the agreement of 27 August 2004, the machinery and equipment SPA is subject to the completion of the purchase of the said lands with the factory thereon?
- F** (l) Whether all the payments made by the plaintiffs in this case to the first defendant and/or the third defendant respectively are, on the facts of this case, payments that the parties had agreed to be taken or treated as payments made pursuant to the said SPAs particularly since the first defendant and/or the third defendant have not denied not having received those monies?
- G** (m) Whether the first defendant and/or the third defendant has evinced an intention to wrongfully evict the plaintiffs from the said lands and depriving the plaintiffs of the use of the factory, machinery and equipment contrary to the representations of the defendants and to the detriment of the plaintiffs?
- H** (n) Whether the third defendant at all times acting as a director and alter ego of the first defendant and the second defendant properly executed the Power of Attorney before an Advocate and Solicitor thereby showing an intention to conclude the SPAs and is thereby estopped from pleading that he was not in possession of his full capabilities when he executed the Power of Attorney?
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- (o) Whether the sums payable under the machinery and equipment SPA is subject to the completion of the lands SPA resulting in the defendants' claim for payment of monies under the machinery and equipment SPA prematurely to be illegal, void and baseless?

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BALANCE OF CONVENIENCE LIES IN GRANTING ENCL 4

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[33] If the defendants are not restrained from entering the lands and the factory and from removing the machinery and equipment, the plaintiffs will suffer irreparable damage that cannot be adequately compensated by damages. On the contrary, any damage to the defendants will be minimal when compared to the damage suffered by the plaintiffs and whatever damages sustained by the defendants, the plaintiffs are able to compensate. To date, there is no credible evidence before this court to demonstrate that the defendants have suffered any damages or detriment whatsoever. The balance of convenience certainly lies in favour of granting an interim injunction in the plaintiffs' favour as prayed for in encl 4.

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[34] The phrases the balance of justice and the balance of convenience are often used interchangeably. So, questions of hardship and inconvenience which are often associated with the expression the balance of convenience are taken into account in the broader enquiry as to 'the balance of justice' (*Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892; *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 181; and *Canadian Medical Laboratories Ltd v Windsor Drug Store Inc* [1992] 99 DLR (4th) 559). Often, the question to ask is whether it is most just in all the circumstances that the relief that is sought should be granted? (*American Cyanamid Co v Ethicon Ltd*). I am acutely aware of what Turner LJ said in *Munro v Wivenhoe and Brightlingsea Ry Co* [1865] 4 De GJ & S 723 at p 733, 46 ER 1100 at p 1104. There Turner LJ said that:

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This court when called upon to grant an interlocutory injunction will act according to the justice of the case as ascertained upon the evidence before it and according to the comparative injury which may arise from granting or withholding the injunction.

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And, after applying all these salient principles, I must categorically say that the balance of convenience lies in favour of granting encl 4. I would make that order accordingly.

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IS THE PRESERVATION OF THE STATUS QUO NECESSARY IN THIS CASE?

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[35] I would answer this question in the positive. It is necessary and it is the basis for the grant of an interlocutory injunction to protect the applicant by preserving the circumstances that exist at the time of the applicant's application to the time when the rights of the parties are finally established by way of a hearing. Cotton LJ explained it better in the case of *Preston v Luck* [1884] 27 Ch D 497 at p 505.

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- A There his Lordship said, in the context of an application for an interlocutory injunction, that, *the object of which is to keep things in status quo, so that if at the hearing the plaintiffs obtain a judgment in their favour, the defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual*. Thus, here it is necessary for an interlocutory injunction to be
- B issued in order to maintain the status quo of the parties pending the determination of the various serious issues as alluded to earlier. The orders prayed for by the plaintiffs herein are intended to preserve the status quo of the parties pending the outcome of the claim by the plaintiffs. The plaintiffs have a genuine and proper claim against the defendants which will be prejudiced or defeated if the defendants are allowed to enter the lands and factory and/or if allowed to remove the machinery and
- C equipment. Any prejudice or harm to the plaintiffs cannot adequately be compensated by damages. Here, the plaintiffs are able to compensate the defendants for any damage and loss that they would suffer as a result of the interlocutory injunction which the plaintiffs now sought. Indeed, there has been no suggestion whatsoever by the defendants that the plaintiffs are not in a position to pay damages.

D ALLEGATION OF BAD FAITH

- [36] The defendants have alleged that the plaintiffs have initiated this action and in particular sought an interim injunction against the defendants in bad faith. This court cannot on affidavit evidence alone draw such an inference as to the bona
- E fides or mala fides of the parties to this action. As the burden of proof of mala fides in this case lies on the defendants, the latter should take the ordinary and obvious course of requiring the deponent of the plaintiffs' affidavits and/or the plaintiffs themselves to submit on the issue of mala fides during cross-examination of the trial of this case (In *Re Smith And Fawcett, Limited* [1942] 1 Ch 304, p 308). In the
- F meantime, the status quo of the parties should be preserved by granting the interlocutory injunction as sought for by the plaintiffs.

ENCLOSURE 26

- G [37] On 15 December 2005, the first defendant filed encl 26 and sought for those prayers as alluded to in the early part of this judgment.

- [38] In *Shamsudin bin Shaik Jamaludin v Kenwood Electronics Technologies (M) Sdn Bhd* [1999] 3 MLJ 438, at p 454, I had occasion to set out the following principles of law. This was what I said:
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In my judgment, the conditions to be fulfilled before an interlocutory mandatory orders to be granted may be listed as follows:

- (1) The applicant must prove by affidavit evidence that his application is an exceptional and extremely rare case which merits the order prayed for.
- I (2) The applicant must show that his case is clear and one which the court thinks ought to be decided at once in his favour.

- (3) The applicant must show a clear case for relief or a high degree of assurance that the injunction, if granted, would rightly be granted.

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[39] In *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271, the late Abdooldader J, writing for the Federal Court had this to say (see pp 273–274):

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Before we deal with the issues raised we should perhaps touch on a point made by Mr Sri Ram for the appellant in referring to the judgment of this court in *Sivaperuman v Heah Seok Yeong Realty Sdn. Bhd* [1979] 1 MLJ 150 which, referring to a pronouncement to that effect in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109, p 114, restates inter alia that an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases. That statement of the law is correct as an interlocutory application for a mandatory injunction is a very exceptional form of relief (*Canadian Pacific Railway v Gaud* [1949] 2 KB 239 (at p 249), but there is no reason why interlocutory or indeed interim mandatory injunctions should not issue in proper and appropriate cases and the court has jurisdiction to so order. Fry LJ, said in *Bonner v Great Western Railway Company* [1883] 24 ChD1 (at p 10): ‘I have no doubt of the jurisdiction of the court to grant a mandatory injunction on interlocutory applications as well as the hearing.’ The case however must be ‘unusually sharp and clear’ (*Shepherd v Sandham* [1971] Ch 340), and the court must feel a high degree of assurance that at the trial a similar injunction would probably be granted but we should observe that questions of degree are involved which depend inter alia upon considerations of hardship to the parties.

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In deciding the manner of interlocutory injunction that should be granted courts of equity will consider how the interests of the parties may best be protected, bearing in mind both the position of the parties subsequently at the final hearing and also questions of hardship and inconvenience in the meantime, and will take into account any other relevant discretionary considerations which may arise. One of the most important circumstances which will be taken into account by the court is the degree of probability with which it appears to be established that the applicant will ultimately succeed at the final hearing. The stronger the case of the applicant that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that his interests be protected by the immediate issue of an injunction (*Bonner*). Other matters of particular importance are, on the one hand, the ease or difficulty with which there can be compliance with a mandatory order and the extent of hardship which compliance will cause the respondent and, on the other hand, the nature of the injury and inconvenience which will be caused to the applicant if he does not obtain protection at once (*Strelley v Pearson* [1880] 15 ChD 113 (at p 117)).

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Adverting now to the points taken in advancing the appeal:

- (1) Whole relief granted by interlocutory order

The short answer to the issue raised in this respect is that the court is not precluded from granting an interlocutory injunction where this would virtually give the applicant therefor on his claim the full relief actually sought to be secured at the final hearing when the matter is viewed on a balance of convenience (*Woodford v Smith* [1970] 1 WLR 806 (at pp 817–818); *Wah Loong (Jelapang) Tin Mine* (at p 114); *Sivaperuman*). If there is plainly no defence to the action, and the only object in raising a defence is delay, an injunction should issue even if it gives the applicant his whole remedy before the trial (*Manchester Corporation v Connolly* [1970] 1 Ch 420 (at p 427)).

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In *Bryanston Finance Ltd v De Vries (No 2)* [1976] 1 Ch 63, Buckley LJ, said (at p 76) that in relation to a petition for the winding-up of a company, the action (for an injunction to

- A restrain the petitioner from petitioning for winding-up) as a whole is in the nature of an interlocutory proceeding. The court in that case held that the company was only entitled to interlocutory relief if on the available evidence it could be said that presentation of a petition would prima facie be an abuse of process, and Sir John Pennycuik said (at p 81):
- B The decision in the *American Cyanamid* case [1975] AC 396 was, as I understand it, addressed to interlocutory motions in the sense of motions seeking interim relief pending determination of the rights of the parties at the hearing of the action.... I do not think the decision should be read as applicable to motions which, though interlocutory in form, seek relief which will finally determine the issue in the action
- C This is in effect a judicial acknowledgement on the lines of the observation by Lord Denning MR, in *Fellowes & Son v Fisher* [1976] QB 122 (at p 129) that an interlocutory decision is often for all practical purposes final, and indeed Lord Diplock in his judgment in the House of Lords in *NWL Ltd v Woods* [1979] 1 WLR 1294 (at p 1306) spoke to the same effect in discussing the decision of the House in *American Cyanamid Co v Ethicon Ltd..*
- D In the matter before us the purchasers' dispute is with the developer who they allege has defrauded them. It is further highly questionable whether the moneys purportedly paid by the purchasers to the developer without the knowledge or consent of the respondent for extras which were not however provided would in fact form part of the purchase price of the units to affect the ceiling stipulated in the Programme. The respondent has expended a very large sum of money to provide finance for the purchasers in this housing project and must necessarily have security by way of charges over the several units in question. Considering
- E all the circumstances of this case, the rights of the parties and the balance of convenience in the matter, we are of the view that this is a case where the court is not precluded from granting the order sought although in effect the respondent would as a result secure the basic relief sought in the action.
- F [40] Zakaria Yatim J (as he then was) in *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271 held that an interlocutory mandatory injunction will not be granted before trial save in exceptional and extremely rare cases.
- G [41] Sad to say, the first defendant has not fulfilled the test for a mandatory injunction. The first defendant has not proven by affidavit evidence that his application is an exceptional and extremely rare case which merits the orders prayed for. A perusal of the third defendant's affidavit in support of encl 26 does not disclose facts or contain particulars to show that this is an extremely rare and exceptional case warranting a mandatory injunction. The test for granting a mandatory injunction has not been fulfilled by the first defendant.
- H [42] Of significance is this. That the orders sought by the first defendant amount to depriving the plaintiffs the use of all the machineries and equipment on the lands. This would cause the plaintiffs' business to come to an abrupt halt and would severely jeopardise the plaintiffs' possession. It must be recalled that it was the defendants who gave the plaintiffs possession of all the machineries and equipment so that the
- I plaintiffs would be able to carry out their business there.

CONCLUSION

[43] For the reasons as adumbrated above, I gave an order in terms of the plaintiffs' application in encl 4. I dismissed the first defendant's application in encl 26 with costs to the plaintiffs. I then proceeded to give the usual case management directions.

Plaintiffs application allowed and first defendant's application dismissed with costs.

Reported by Brendan Navin Siva

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